APPENDIX
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 771, 795—August Term, 1981

(Argued: February 25, 1982 Decided: April 1, 1982)

Docket Nos. 81-7792, 81-7832

CHECKRITE PETROLEUM, INC.,

Plaintiff-Appellee-Cross-Appellant,

—against—

AMOCO OIL COMPANY,

Defendant-Appellant-Cross-Appellee.

Before:

FEINBERG, *Chief Judge*, VAN GRAAFEILAND and MESKILL, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Brieant, *J.*, enjoining appellant under the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801 *et seq.* (Supp. IV 1980), from terminating its agreement with appellee and awarding attorney's fees to appellee.

Reversed.

RICHARD R. LUTZ, New York, New York (Townley & Updike, New York, New York, of counsel), *for Defendant-Appellant.*

JACOB E. HELLER, New York, New York, *for Plaintiff-Appellee.*

Opinion of The United States Court of Appeals for the Second Circuit

MESKILL, *Circuit Judge:*

Amoco Oil Company ("Amoco") appeals from a judgment of the United States District Court for the Southern District of New York, Brieant, *J.*, enjoining it under the Petroleum Marketing Practices Act, 15 U.S.C. §§ 2801 *et seq.* (Supp. IV 1980) ("PMPA"), from terminating[1] its agreement with Checkrite Petroleum, Inc. ("Checkrite") except in accordance with the PMPA and awarding Checkrite attorney's fees. Because we find that the PMPA does not apply to the relationship between Amoco and Checkrite, we reverse.[2]

BACKGROUND

On March 31, 1976, Amoco and Checkrite entered into a contract covering the five-year period ending May 30, 1981. The agreement, which was drafted by Amoco, designated Checkrite a "broker." Under the terms of the contract, Checkrite agreed to "cause" retail gasoline dealers listed in an attached Schedule "A"

> to execute and deliver to Amoco Dealer Sales Agreements on Amoco's standard form being offered to Amoco in the Metropolitan New York City area whereby such dealers contract to purchase from Amoco, petroleum products for resale at said service stations.

App. at 18. As consideration for Checkrite's efforts, Amoco agreed to pay Checkrite a commission of 1.9 cents on each gallon of gasoline and ten per cent on the dollar volume of motor oil sold by Amoco to the dealers listed on Schedule "A".

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[1] Because Checkrite's agreement with Amoco expired under its terms before the district court issued the injunction in this case, the injunction should, technically, have prohibited Amoco from failing to renew the agreement under 15 U.S.C. § 2802(a)(2), rather than from terminating the agreement under 15 U.S.C. § 2802(a)(1). For clarity, we adhere to the district court's terminology which apparently has not confused the parties in this case.

[2] Checkrite cross-appeals from the district court's denial of its request for damages. Because we hold that Checkrite is entitled to no relief under the PMPA, we affirm the denial of a damage award.

Amoco entered into contracts directly with these retail dealers under which Amoco agreed to sell and to deliver gasoline and diesel fuel to the dealers at its standard prices. The dealer agreements also provided for the dealers' use of Amoco's trademark.

Amoco informed Checkrite by letter dated November 25, 1980 that it did not intend to renew or extend its agreement with Checkrite after the May 30, 1981 expiration date. Checkrite then instituted this suit, claiming that it maintained a "franchise relationship" with Amoco and was therefore protected against termination under the PMPA. The complaint sought actual damages, exemplary damages, injunctive and declaratory relief, attorney's and expert witness' fees, costs and disbursements.

The district court ruled that while Checkrite would not be entitled to protection under a "narrow reading" of the statute,

> Checkrite fits within the purpose of the PMPA as an independent entrepreneur whom Congress thought worthy of protection against unjustified termination; therefore Checkrite is a franchisee within the purpose of the statute.

App. at 86. Accordingly, the court granted summary judgment for Checkrite.[1]

DISCUSSION

The purpose of the PMPA is to establish "minimum Federal standards governing the termination and nonrenewal of franchise relationships for the sale of motor fuel by the franchisor or supplier of such fuel." S. Rep. No. 95-731, 95th Cong., 2d Sess. 15, *reprinted in* [1978] U.S. Code Cong. & Ad. News 873, 873. Section 102 of the PMPA, 15 U.S.C. § 2802, prohibits a franchisor from terminating or failing to

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[1] The district court enjoined Amoco from terminating its agreement with Checkrite without complying with PMPA requirements and awarded Checkrite attorney's fees. The court denied Checkrite's pleas for other relief.

renew a franchise without satisfying certain notice provisions and without stating a reason for termination sanctioned by the act. It is undisputed that Amoco did not satisfy the PMPA termination requirements in its dealings with Checkrite. The issue in this case is whether Checkrite is a "franchisee" within the meaning of the act.

"[I]n any case concerning the interpretation of a statute the 'starting point' must be the language of the statute itself." *Lewis* v. *United States*, 445 U.S. 55, 60 (1980). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Products Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Russo* v. *New York*, slip op. 1223, 1236 (2d Cir. Feb. 9, 1982). The PMPA contains the following relevant definitions:

As used in this subchapter:

(1)(A) The term "franchise" means any contract—

(i) between a refiner and a distributor,

(ii) between a refiner and a retailer,

(iii) between a distributor and another distributor, or

(iv) between a distributor and a retailer,

under which a refiner or distributor (as the case may be) authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such use.

. . . .

(2) The term "franchise relationship" means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.

. . . .

(4) The term "franchisee" means a retailer or distrib-

utor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(5) The term "refiner" means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.

(6) The term "distributor" means any person, including any affiliate of such person, who—

(A) purchases motor fuel for sale, consignment, or distribution to another; or

(B) receives motor fuel on consignment for consignment or distribution to his own motor fuel accounts or to accounts of his supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.

(7) The term "retailer" means any person who purchases motor fuel for sale to the general public for ultimate consumption.

. . . .

(15) The term "affiliate" means any person who (other than by means of a franchise) controls, is controlled by, or is under common control with, any other person.

15 U.S.C. § 2801.

Checkrite neither purchases motor fuel nor receives it on consignment from Amoco. Therefore, Checkrite is neither a "distributor" nor a "retailer" within the plain wording of the PMPA.[4] Because only retailers and distributors fall within the statute's definition of "franchisee," Checkrite is not within the PMPA's plain terms. It is a well-established rule

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[4] Checkrite persists in the argument, rejected by the district court, that it is an affiliate of Amoco and is therefore a "distributor" under the PMPA. Since there is no basis in the record to support a finding that Checkrite "controls, is controlled by, or is under common control with" Amoco, we need not pass on the rest of Checkrite's reasoning on this point.

that "when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn . . . from any extraneous source." *Caminetti* v. *United States*, 242 U.S. 470, 490 (1917); *Board of Education* v. *Harris*, 622 F.2d 599, 609 (2d Cir. 1979), *cert. denied*, 449 U.S. 1124 (1981). Strict construction is particularly appropriate where, as here, the statute in question is in derogation of common law rights. *See, e.g., In re Liberatore*, 574 F.2d 78, 85 (2d Cir. 1978); *United States* v. *Mead*, 426 F.2d 118, 123 & n.5 (9th Cir. 1970); *Bauers* v. *Heisel*, 361 F.2d 581, 587 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967).

Despite these well-known canons of statutory construction, and notwithstanding its failure to satisfy the unambiguous statutory definition of "franchisee," Checkrite argues, and the district court found, that the legislative history of the PMPA indicates that Congress intended to "accord broad protection to persons 'marketing' branded fuels." App. at 80. The court held, therefore, that Checkrite was within the intended scope of PMPA protection. Even if it were necessary in this case to search beyond the statutory language for an expression of legislative intent, we would disagree with the district court's conclusion.

The district court relied principally on two passages of legislative history in concluding that Checkrite is a "franchisee." First, the court cited the Senate Report on the PMPA, which states:

> The committee also sought to resolve a problem raised by the definition of "distributor" in title I. Under H.R. 130 as presented to the committee a distributor includes a person or his affiliate "who receives motor fuel on consignment for consignment or distribution *to his own motor fuel accounts*." (emphasis added)
>
> The question arises of distinguishing a consignee's accounts from those of his supplier. The committee was concerned that a consignee might be treated as a dis-

tributor under H.R. 130 with respect to some accounts but not with respect to others. Rather than attempt to delineate a means of making this distinction as to ownership or control of the accounts, the committee chose to treat a consignee as a distributor regardless of whether the account is that of the consignee or of the supplier.

However, the committee included a proviso that the definition of distributor does not include employees of the supplier, nor a person who merely serves as a common carrier who provides transportation services for the supplier. With this proviso the committee retained the distinction that independent entrepreneurs are to be included as distributors while employees of the supplier or those common carriers who merely supply transportation as would a common carrier are not distributors under this definition.

S. Rep. No. 95-731, 95th Cong., 2d Sess. 27, *reprinted in* [1978] U.S. Code Cong. & Ad. News 873, 885.

The relevance of this passage to the issue in this case is dubious. In any event, the passage provides no support for Checkrite's position. The passage specifically addresses particular problems of the definition of "distributor" as it relates to consignees. Because consignees are covered by the PMPA's definition of "distributor" the Senate Report suggests no congressional intent beyond that expressed by the statute's plain terms.

The district court also relied heavily on the remarks of Representative Dingell during the House debates on the PMPA:

It was our intention to cover a consignee or commission agent where he in fact provides the functions and services of a jobber. It was not intended that a consignee would be covered if, in fact, he is an employee. This is a question of fact resolution of which lies in the hands

of the courts whose job it will be to see that fairness is accorded to all parties.

> Let me read from the report. The report states:
>
> '[I]t is intended that the provisions of the title would apply to a consignee who acts generally like a jobber.'
>
> What I am saying is that where a person has the characteristics of an employee, although he in fact does handle the product, he is not covered. It is not our intention to expand the rights of employees. Where a consignee functions, however, as a jobber and does everything that a jobber would do, save taking title to the motor fuel—or most of what a jobber does—he would then have the protections afforded by the legislation. We have tried to draw that very narrow distinction. It is not our goal to create problems for either side in this controversy but to leave this as a fact question which will be properly and prudently decided by the court.

123 Cong. Rec. 10386 (1977).

We do not think that these remarks constitute "a clearly expressed legislative intent", *Consumer Products Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. at 108, to cover parties not within the terms of the statute. Representative Dingell was addressing the distinction between an employee of a refiner who is technically a consignee and an independent consignee. Like the references to "consignee" in the Senate Report discussed above, Representative Dingell's remarks do not contradict or go beyond that which is expressed in the plain word of the PMPA. The single reference to "commission agent" is, at most, ambiguous and hardly constitutes a sufficient ground for ignoring the statutory language.

The district court's reliance on Representative Dingell's reference to jobbers and on the claimed similarities between Checkrite and a typical jobber is also misplaced. The term "jobber," which is not defined in the PMPA, is generally taken to mean "[o]ne who buys and sells goods for others[,]"

Black's Law Dictionary 970 (4th ed. 1968), or "wholesaler[.]" Webster's Third New International Dictionary 1217 (1971). Thus, a typical branded fuel jobber would fit squarely within the PMPA definition of "distributor." Because Checkrite does not buy and sell motor fuel, it is not a typical jobber; hence Checkrite is not a distributor; and therefore Checkrite is not a franchisee entitled to protection under the PMPA.

Checkrite's final argument, adopted by the district court, is that termination of its contract with Amoco will have the same effect on the dealers covered by the contract as direct termination of the dealers by Amoco. Checkrite, claiming that it has the power to order dealers to sell or not to sell any brand of gasoline it chooses, reasons that if it is terminated by Amoco, it will in turn cause the dealers to terminate their agreements with Amoco. Thus, Checkrite appears to argue that if Amoco can terminate it with impunity, it can circumvent the protections that the PMPA provides against unfair termination of dealers.

This "logic" is wholly unpersuasive. The PMPA is aimed at preventing unfair and discriminatory termination of franchisees by franchisors. Amoco readily concedes that its relationships with the retail dealers involved in the Amoco-Checkrite contract are governed by the PMPA and that it cannot terminate those relationships without complying with the statute's provisions. The dealers are threatened only by Checkrite. That Checkrite might take action detrimental to dealers certainly does not provide Checkrite with rights against Amoco under the PMPA.[1]

In summary, we hold that the plain terms of the PMPA do not provide Checkrite any protection against termination

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[1] As an alternative ground for reversal Amoco asserts that Checkrite is not a "franchisee" because the Amoco-Checkrite agreement does not authorize Checkrite to use Amoco's trademark as required by 15 U.S.C. § 2801(1)(A) & (2). Because we find that Checkrite does not meet the threshold requirement of being a "retailer" or "distributor" within the meaning of the PMPA, we need not determine whether Checkrite also fails to meet the requirement of being "authorized or permitted" to use Amoco's trademark.

by Amoco, and that the legislative history of the act expresses no congressional intent to go beyond these plain terms. Therefore, we reverse the judgment of the district court and remand this case with directions to dismiss the complaint and to vacate the award of attorney's fees.

So ordered.

MEMORANDUM AND ORDER OF UNITED STATES DISTRICT COURT DATED JUNE 15, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHECKRITE PETROLEUM, INC.,

Plaintiff

-against-

AMOCO OIL COMPANY,

Defendant

81 Civ. 2541-CLB

Brieant, J.

This action, filed April 28, 1981 by plaintiff Checkrite Petroleum, Inc. ("Checkrite") against defendant Amoco Oil Company ("Amoco"), presents a question apparently of first impression in this Court: whether plaintiff, a so-called "broker," is protected as a "franchisee" under the Petroleum Market Practices Act ("PMPA"), 15 U.S.C. §2801, *et seq.*

Plaintiff originally moved pursuant to PMPA §105(b), 15 U.S.C. §2805(b), for a preliminary injunction; plaintiff requested an order restraining Amoco "from the enforcement of its attempted cancellation of plaintiff's agreement with said defendant and to carry out its alleged rights pursuant to said cancellation . . . . " Amoco thereafter moved to dismiss the complaint on the grounds that the plaintiff is not protected by the PMPA, and that plaintiff therefore may not maintain a civil action under PMPA §105(a), 15 U.S.C. §2805(a). Rule 12(b)(1) and (6), F.R.Civ.P.

Memorandum and Order of United States District Court Dated June 15, 1981

At a hearing before this Court on May 19, 1981, defendant stipulated with plaintiff in lieu of an injunction that defendant would continue, pending the disposition by this Court of the defendant's motion to dismiss the complaint, to supply its product to the dealers who were lessees of, or in a contractual arrangement with, the plaintiff.

THE FACTS

On March 31, 1976 the parties entered into a contract in which Checkrite, designated in the contract drawn by Amoco as the "Broker," agreed to "cause" a number of listed station operators, or dealers to "execute and deliver to Amoco, Dealer Sales Agreements on Amoco's standard form . . . whereby such dealers contract to purchase from Amoco, petroleum products for resale at said service stations," during the term of the contract. In consideration, Amoco agreed to pay to plaintiff a "commission" of 1.9 cents per gallon on each gallon of gasoline that Amoco sold or delivered to the operators. Amoco also agreed to pay plaintiff a commission on the sale of motor oil to these operators. The term of this contract extended from June 1, 1976 to May 30, 1981. This contract contained a provision concerning renegotiation and renewal of the contract by the parties. Should the contract not be renewed, Checkrite would have been able to change the colors of the stations by directing the operators to purchase elsewhere.

Pursuant to this agreement, plaintiff entered into contracts with station operators, whereby plaintiff would lease service stations to these operators on the condition that the operators would purchase motor fuel and other supplies from the company designated by the plaintiff. To complete the three-sides arrangement, Amoco entered into contracts with these operators.

Memorandum and Order of United States District Court Dated June 15, 1981

Under these contracts defendant agreed to supply the station operators with Amoco products, which the operators then resold to consumers, using the applicable Amoco trademarks. Amoco also leased to the various operators equipment necessary to continued operation of the stations. At present, there are eleven station operators which have entered into such contracts with both plaintiff and defendant.

By letter dated November 25, 1980, Amoco notified Checkrite that Amoco had "decided that it does not wish to extend, renew, or enter into a new agreement" with Checkrite. This litigation resulted.

In its complaint, plaintiff characterizes its relationship with Amoco and the dealers as a "tri-party agreement," and asserts that "it was the intent that defendant be the actual supplier, that defendant acting in concert with plaintiff arrange and obtain the dealer, make available to the dealer a station at which only the product of defendant be sold and the plaintiff undertake to supply defendant's product and dedicate his property to the operation." The complaint states that plaintiff is entitled to the protection of the PMPA because it is in a "franchise-relationship" with the defendant, as well as a "distributor-affiliate." The complaint requests damages, injunctive and declaratory relief, exemplary damages, reasonable attorneys and expert witness fees, costs and disbursements. Jurisdiction in this Court is founded on 15 U.S.C. §2805(a).

The Petroleum Market Practices Act

The Petroleum Market Practices Act, 15 U.S.C. §§ 2801-28, enacted June 6, 1978 as Pub.L. No. 95-297, 92 Stat. 322,[1] has

as its purpose the "establishment of minimum Federal standards governing the termination and nonrenewal of franchise relationships for the sale of motor fuel by the franchisor or supplier of such fuel." S.Rep. No. 95-731, 95th Cong., 2d Sess. 15 (1978, reprinted in [1978] U.S. Code Cong. & Ad. News 873, 873. *See, Halder v. Standard Oil Co., et al.*, 642 F.2d 107, 109 (5th Cir. 1981), 1981-1 Trade Cas. 91 63,934 at 75,833 (the purpose of the PMPA is to "increase the bargaining strength of individual franchisees in the petroleum industry").

Under §102 of the Act, 15 U.S.C. §2802, a franchisor may not terminate or fail to renew any franchise unless the franchisor complies with specific notification procedures found in §104 of the PMPA, and unless the franchisor terminates or fails to renew the franchise based upon one or more of the grounds enumerated in §102. These grounds include a failure by the franchisee to comply with any reasonable and materially significant provision of the franchise agreement; a failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise; and the occurance of an event which is relevant to the franchise relationship and which reasonably leads to a termination of the franchise. Each of these grounds and the other permissible grounds for termination contain time limitations by which a franchisor must exercise its right to terminate.

Section 104 of the PMPA, 15 U.S.C. §2804, requires that a franchisor furnish the franchisee with notification of a termination, in most cases, not less than 90 days prior to termination. The termination notice must be in writing, posted by certified mail or personally delivered to the franchisee, and must contain a statement of the franchisor's intention to terminate

and its reasons for termination, the date on which the termination will take effect, and a summary statement, prepared by the Secretary of Energy, setting forth the terms of the PMPA.

Defendant Amoco concedes that the notice of termination sent to Checkrite did not comply with these provisions of the PMPA; for instance, the notice did not state the reasons for termination of the agreement, nor did it contain the summary statement. Amoco argues, however, that it was not required to terminate its agreement with Checkrite in accordance with the PMPA, because the agreement between Checkrite and Amoco was not a "franchise," as that term is defined in the PMPA.

Amoco also argues that Checkrite, because not a "franchisee," may not maintain an action against Amoco under the PMPA §105(a), 15 U.S.C. §2805(a), which provides in relevant part that "if a franchisor fails to comply with the requirements of section 2802 or 2803, the franchisee may maintain a civil action against such franchisor [which] may be brought, without regard to the amount in controversy, in the district court of the United States . . . ." It is to this latter jurisdictional issue which the Court now turns.

In resolving whether plaintiff is a franchisee under the PMPA, this Court's "analysis must begin with the language of the statute itself," *Touche Ross & Co. v. Redington,* 442 U.S. 560, 568 (1979), and this language must be given its "ordinary meaning in the absence of persuasive reasons to the contrary," *Burns v. Alcala,* 420 U.S. 575, 581 (1975). Where Congress has specifically defined a word in a statute, as in the instant case, this Court must not redefine such words in ways not contemplated by the Congress. Nevertheless, a court's statutory analysis would be unduly sterile

if it refused to consider the purposes Congress sought to serve by enacting a particular statute. *See Chapman v. Houston Welfare Rights Organization,* 441 U.S. 600, 608 (1979).

The PMPA contains the following relevant definitions:

> "As used in this subchapter:
>
> (1)(A) The term 'franchise' means any contract—
>
> (i) between a refiner and a distributor,
>
> (ii) between a refiner and a retailer,
>
> (iii) between a distributor and another distributor, or
>
> (iv) between a distributor and a retailer,
>
> under which a refiner or distributor (as the case may be) authorizes or permits a retailer or distributor to use in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such use.
>
> (2) The term 'franchise relationship' means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.
>
> (4) The term 'franchise' means a retailer or distributor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

> (5) The term 'refiner' means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.
>
> (6) The term 'distributer' means any person, including any affiliate of such person, who—
>
> (A) purchases motor fuel for sale, consignment, or distribution to another; or
>
> (B) receives motor fuel on consignment for consignment or distribution to his own motor fuel accounts or to accounts of his supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for such supplier.
>
> (7) The term 'retailer' means any person who purchases motor fuel for sale to the general public for ultimate consumption.
>
> (15) The term 'affiliate' means any person who (other than by means of a franchise) controls, is controlled by, or is under common control with, any other person." 15 U.S.C. §2801(1)(A), (4), (5), (6), (7), (15).

Defendant here argues that Checkrite is not a "franchisee," because Checkrite is neither a distributor nor a retailer, as those terms are defined above. Defendant asserts that the agreement between Amoco and Checkrite demonstrates that Checkrite does not purchase motor fuel from Amoco, does not receive motor

fuel on consignment from Amoco, and does not purchase motor fuel for sale to the general public. Pointing to the Senate Report on the PMPA, Amoco contends that Checkrite therefore has not, as required, met its "burden of proving the existence of a franchise, his status as a franchisee, and the termination of the franchise or nonrenewal of the franchise relationship." S. Rep. No. 95-731, 95th Cong., 2d Sess. 15, 41, *reprinted in* [1978] U.S. Code Cong. & Ad. News 873, 899.

In an attempt to meet this burden, plaintiff argues that it is "a person involved in the (i) distribution, (ii) in the gasoline service station serviced by the distribution, (iii) in the arrangement between defendant and the dealers, etc." Plaintiff further contends that it is "an Affiliate of the distributor-refiner in this case," an "arm of defendant's distributive system," a "distributor-cosignee," and that it "may even be covered as an Affiliate or as an arm of the Dealer." Even assuming that plaintiff is an "Affiliate of the distributor-refiner," presumably Amoco, this would make plaintiff at best a franchisor, rather than a franchisee, in this case; therefore, it is not necessary to consider this contention further.

To analyze plaintiff's contentions that it is a "distributor-consignee" and "an arm of defendant's distributive system," the Court must turn to the PMPA, which defines a "distributor" as a person, including an affiliate of such person, who either purchases motor fuel or receives motor fuel on consignment. *See* 15 U.S.C. §2801(1)(A)(6). While Checkrite does not allege in its complaint that it either purchases motor fuel or receives motor fuel on consignment from Amoco, Checkrite does contend that it is "involved in the sale of fuel products at the dealer level," without describing the involvement. *See* Letter from Jacob Heller, Esq. to the Court of May 20, 1981 and docketed herein.

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This statement does not, however, find support in the Agreement between Amoco and Checkrite, which provides that:

> "1. Broker represents to Amoco that there are fully equipped and going filling and automobile service stations at the locations leased to, or owned by, retail dealers *in the operation of whose stations* Broker does not participate . . . ." (Emphasis added).

Another paragraph in that Agreement provides that:

> "14. In the event Broker, as an individual or through any subsidiary or controlled corporation, becomes the retail dealer at an account identified in Schedule 'A' such station will automatically be eliminated from Schedule 'A' and the terms of this Contract, and Amoco would then enter into a contractual relationship with Broker as a dealer, no further commissions would be paid on gasoline sold at said service station."

The only provision of the Agreement which shows any "involvement" by Checkrite in the sale of fuel products states that "it shall be the responsibility of Broker to insure that Amoco's equipment located at [the specified facilities] is secured from vandalism and Broker shall be responsible for cost of replacement should vandalism occur."

In the absence of a straightforward assertion by the plaintiff that it sells or purchases fuel, or that it receives fuel on consignment, this Court concludes that under a narrow reading of the PMPA Checkrite would not be considered a "distributor."

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Checkrite is arguably an affiliate of the 11 operators in that Checkrite may "control" these operators. These operators, however, are not distributors under the PMPA, but rather they are "retailers," who sell fuel products directly to the consuming public. Because the definition of "retailer" under the PMPA, in contrast to the definition of "distributor," does not include an "affiliate" thereof, plaintiff's assertion that it may be an "affiliate" of the station operators does not accord plaintiff the status of a "retailer" under the PMPA.

As revealed by the discussion above, a narrow reading of the statutory definitions found in the PMPA excludes Checkrite from coverage thereunder as a franchisee. Checkrite argues strongly, however, in essence, and the Court agrees, that such a literal reading frustrates the legislative purpose of the PMPA. In the widely quoted words of Judge Learned Hand:

> "There is no more likely way to misapprehend the meaning of language—be it in a constitution, a statute, a will or a contract—than to read the words literally, forgetting the object which the document as a whole is meant to secure. Nor is a court ever less likely to do its duty than when, with an obsequious show of submission, it disregards the overriding purpose because the particular occasion which has arisen, was not foreseen. That there are hazards in this is quite true; there are hazards in all interpretation, at best a perilous course between dangers on either hand; but it scarcely helps to give so wide a berth to Charybdis' maw that one is in danger of being impaled upon Scylla's rocks." *Central Hanover Bank & Trust Co. v.*

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Commissioner of Internal Revenue, 159 F.2d 167, 169 (2d Cir. 1947), *cert. denied*, 331 U.S. 836 (1947).

Checkrite contends that if Amoco is allowed to terminate its contract with Checkrite without following the procedures required by the PMPA, the 11 operators (involved in the tri-partite relationship among Checkrite, Amoco and the operators) will also be terminated by Amoco without having been accorded the protections of the PMPA. This contention is based upon the following reasoning: after the contract between Checkrite and Amoco is terminated, Checkrite, of course, will not designate Amoco as the supplier for the 11 operators to whom Checkrite leases service stations; these operators, however, currently have dealer supply agreements with Amoco; Amoco's offer in this case to release these operators from their contracts with Amoco would, if accepted, effectively terminate the franchise relationship between Amoco and the operators, and would be accomplished by Amoco without compliance with the PMPA.[1]

Thus, although Amoco has conceded that the station operators are "franchisees" under the PMPA, and that therefore Amoco cannot terminate them without complying with the PMPA, and although Amoco has stated that it will continue to honor its supply agreements with the operators despite its termination of its contract with Checkrite, Checkrite contends, and the Court finds, that the inevitable practical effect of the termination by Amoco of its agreement with Checkrite will be the termination at the instance of Checkrite of the franchise relationship between Amoco and the 11 operators. Checkrite argues essentially, therefore, that the purpose Congress sought to serve in enacting the PMPA would be served more fully if the definition of

franchisee under the PMPA were read to include persons or companies such as Checkrite, who possess a significant part of the bundle of economic rights or powers characteristic of a "franchisee" marketing brand name motor fuel.

The legislative history of the PMPA provides support for plaintiff's contentions. That history suggests that, although Congress did not explicitly define "franchisee" to include a "broker" or middleman such as Checkrite, who controls a retail station by contract as to its purchase of motor fuel, but who does not actually sell, purchase, or receive motor fuel, Congress did intend that the PMPA would accord broad protection to persons "marketing" branded fuels.

The Senate Report states that the "term 'distributor' is defined broadly to include both marketers who purchase motor fuel for distribution and those who receive motor fuel on consignment for distribution to their own motor fuel accounts or to those of their supplier." S.Rep. No. 95-731, 95th Cong., 2d Sess. 30, *reprinted in* [1978] U.S. Code Cong. & Ad. News 873, 888. The Report expanded on this issue:

> "The committee also sought to resolve a problem raised by the definition of distributor in title I. . . . . The question arises of distinguishing a consignee's accounts from those of his supplier. The committee was concerned that a consignee might be treated as a distributor under H.R. 130 with respect to some accounts but not with respect to others. Rather than attempt to dilineate a means of making this distinction as to ownership or control of the accounts, the committee chose to

> treat a consignee as a distributor regardless of whether the account is that of the consignee or of the supplier." *Id.* at 27, *reprinted in* U.S. Code Cong. & Ad. News 873, 885.

The Committee noted that it had retained the distinction from the House version of the bill, that:

> "independent enterpreneurs are to be included as distributors while employees of the supplier of those common carriers who merely supply transportation as would a common carrier [sic] are not distributors under this definition." *Id.*

During the House debate on the PMPA, the Act was described as extending full franchise protection to distributors and jobbers, who in turn had an obligation to comply with the PMPA in their dealings with their own franchisees. 123 Cong. Rec. H 3013 (April 5, 1977) (remarks of Rep. Dingell). The franchise relationship was described as "the agreement a jobber has with a refiner and the agreement that a jobber or refiner has with a service station *through which the refiner's brand is used in marketing the motor fuel.*" 123 Cong. Rec. _____, H 3014 (April 5, 1978) (remarks of Rep. Brown) (Emphasis added). In contrast, the PMPA was not, according to debate in the House of Representatives, designed to address the issue of "the security of the supply relationships of *nonbranded independent marketers, that is, marketers which are not franchisees.*" 123 Cong. Rec. ____, H 3013 (April 5, 1977) (remarks of Rep. Dingell) (Emphasis added).

In the instant case, the contracts among Amoco, Checkrite

and the station operators clearly set forth an agreement for the joint marketing by these companies, or individuals, of branded fuel.

This Court finds strong support for the plaintiff's position in the following statement:

> "It was our intention to cover a consignee or commission agent where he in fact provides the functions and services of a jobber. It was not intended that a consignee would be covered if, in fact, he is an employee. This is a question of fact resolution of which lies in the hands of the courts whose job it will be to see that fairness is accorded to all parties.
>
> Let me read from the report, The report states:
>
> '[I]t is intended that the provisions of the title would apply to a consignee who acts generally like a jobber.'
>
> What I am saying is that where a person has the characteristics of an employee, although he in fact does handle the product, he is not covered. It is not our intention to expand the rights of employees. Where a consignee functions, however, as a jobber and does everything that a jobber would do, save taking title to the motor fuel—or most of what a jobber does—he would then have the protections afforded by the legislation. We have tried to draw that very narrow distinction. It is

> not our goal to create problems for either side in this controversy but to leave this as a fact question which will be properly and prudently decided by the court." *Id.* at _____, H 3016 (remarks of Rep. Dingell).

This statement, together with the other legislative history noted, suggests that in enacting the PMPA, Congress did not intend to protect only those persons who literally take formal title to or consignment of motor fuel, but also those independent entrepreneurs who market branded motor fuel on behalf of oil companies.

This Court finds that Checkrite is an independent entrepreneur engaged in marketing Amoco's branded motor fuel. Although the contract between Checkrite and Amoco, drawn by Amoco, labels Checkrite as a "broker," Checkrite did more than merely act as such. In addition to "finding" dealers for Amoco (the contract between Checkrite and Amoco contemplated that), Checkrite would lease service station to operators who would sell Amoco fuel. Checkrite also had an ongoing responsibility under the contract to assure that Amoco's equipment, located at its leased stations, was secure from vandalism.

This Court therefore concludes, based on the relevant legislative history of the PMPA, that Checkrite is a "franchisee" under the PMPA. Furthermore, the Court concludes that the contract between Amoco and Checkrite is a "franchise," as defined in the PMPA, because the contract is one between a refiner, Amoco, and a "distributor," Checkrite, under which the refiner authorized the distributor to use the refiner's trademark at its leased stations in connection with the sale, consignment or

distribution of motor fuel; the Court so finds because the contract directed Checkrite to obtain dealers to sell branded Amoco motor fuel.

This Court notes that for various reasons, the business relationships by which any product, including motor fuel, is brought to market will comprise infinite variations in the legal forms used. Labeling an independent entrepreneur as a "broker," particularly when this labeling takes place in a contract drawn by the opposing party, does not make the independent entrepreneur a broker. Rather, consideration must be given to the totality of the economic bundle of rights and powers which the party whose status is being considered possesses. The economic function performed by Checkrite was to assemble a group of stations, and to assure that the refiner's brand would be displayed and its product sold at the stations, and that the refiner's leased equipment would be protected against vandalism. This in turn required Checkrite to acquire ownership of the real property, or control through long-term leases, and thereafter to lease or sub-lease the eleven properties to station operators who would hire employees and man the pumps. For this service which it performed as a part of the chain extending from refinery to market, Checkrite earned a profit or economic rent, paid in this instance by the refiner, but ultimately passed along to the consumer. The same economic result could have been received by Checkrite if it had purchased the motor fuel or accepted it on consignment from Amoco, and then resold the product to its sub-tenants. It was not necessary for Checkrite to resell product in order to accomplish its economic purpose. Indeed, it was more practical to have the station operators buy the motor fuel directly from Amoco. This shifted the credit risk for default in payment by the station operator from Checkrite to Amoco, and decreased the amount of

supervision of the operators which Checkrite would have to perform. Alternatively, Checkrite could have operated the eleven stations with its own employees. Indeed, the parties contemplated this possibility and provided that when and if Checkrite had to do that because of the default of a tenant operator, it would no longer receive the additional payment. There are numerous other factors affecting the choice of legal form, including comparative cost of insurance, the risk of theft or loss, and the necessity to supervise, all of which entered into decisions concerning the form or structure of the tri-partite relationship, but viewed as an economic reality, the position of Checkrite in this relationship is almost identical to that of a jobber, who has a captive group of station operators pledged to it by contract to sell whatever brand of motor fuel it designates, and who supplies the captive operators with the product which it in turn buys from the refiner. Clearly such a jobber is protected by the PMPA; the differences in legal form between Checkrite's operation and that of the typical or traditional petroleum jobber bears no direct relationship to the economic realities. The economic realities make Checkrite a jobber.

The power to demand that the station operators cease using Amoco products and to change the colors of their stations to another brand gives Checkrite a power which in law and economic theory is generally held by the station operator or dealer himself. What has happened is that such a significant part of the economic rights and powers of the dealers has been withheld by Checkrite from the station operators, that Checkrite fits within the purpose of the PMPA as an independent entrepreneur whom Congress thought worthy of protection against unjustified termination; therefore Checkrite is a franchisee within the purpose of the statute.

Memorandum and Order of United States District Court Dated June 15, 1981

Accordingly, the defendant's motion to dismiss is denied.

The Court's consideration of the matter suggests that plaintiff Checkrite is entitled to summary judgment in its favor. The Court is concerned, however, that there may be additional documents or factual information which either or both parties may require to have in the Court record prior to departure on an uncharted journey to the (allegedly) Temporary Emergency Court of Appeals. This journey they certainly must take, as this is a case of first impression involving statutory construction of a most significant sort.[3] Accordingly, the Court directs that a conference take place on June 25, 1981 at 4:00 P.M. in Courtroom 705, at which time this Court will examine and consider whether additional proof by way of document or testimony must be taken, and will make a final determination whether summary judgment should be granted to plaintiff based on the reasoning and analysis set forth hereinabove.

The Court now grants the preliminary injunction as requested, pursuant to 15 U.S.C. §2805(b), which provides in relevant part:

> "(b)(1) In any action under subsection (a), the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the requirements of section 2802 or 2803, including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.
>
> (2) Except as provided in paragraph (3), in any action under subsection (a), the court shall grant a preliminary injunction if—

Memorandum and Order of United States District Court Dated June 15, 1981

(A) the franchisee shows—

(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and

(ii) there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

(B) the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

(3) Nothing in this subsection prevents any court from requiring the franchisee in any action under subsection (a) to post a bond, in an amount established by the court, prior to the issuance or continuation of any equitable relief."

The Court finds, pursuant to §2805(b), *supra*, that Checkrite has shown that a franchise relationship between it and Amoco has not been renewed by Amoco, and that in so doing, Amoco has not complied with the PMPA, as Amoco concedes. Because the franchise agreement between Amoco and Checkrite lapsed by its terms on May 30, 1981, a preliminary injunction is necessary to prevents hardship to Checkrite. The balance of hardships tips in favor of Checkrite because in the absence of injunctive relief, Checkrite would be obliged to designate another oil company to

sell fuel to its operators, which may be impossible, and in any event would disrupt the operation of the service stations severely. In contrast, injunctive relief merely maintains the status quo, with Amoco delivering and selling motor fuel to the operators and Checkrite receiving commissions, pending the final disposition of this case.

Counsel for the parties are directed to confer with each other in an effort to agree upon the amount of an adequate bond or security which would protect the interests of Amoco with respect to the injunction.

The foregoing constitutes findings and conclusions, based on the submitted documents and the transcript of hearing on May 19, 1981, for purposes of Rule 65, F.R.Civ.P., to the extent applicable to this case, and pursuant to 15 U.S.C. §2805(b).

Settle an Injunction in writing on five (5) days actual notice.

So Ordered.

Dated: New York, New York
June 15, 1981

CHARLES L. BRIEANT
U.S.D.J.

Memorandum and Order of United States District Court Dated June 15, 1981

1. H.R. 130, comprising titles I and II of the PMPA, was passed by the House of Representatives on April 5, 1977, 123 Cong. Rec. _____, H 3019. An amended version of H.R. 130, which added title III and contained amendments to title I of the PMPA was passed by the Senate on May 9, 1978. 124 Cong. Rec. _____, S 7158. The House adopted the Senate's amended version of the PMPA on June 6, 1978. 124 Cong. Rec. _____, H 5003.

2. In addition, neither party explains the effect, if any, of the following provision contained in the agreement between Amoco and Checkrite:

> "17. It is mutually agreed between the parties that the Amoco Dealer Sales Agreements cited in Paragraph 1 hereof, shall contained [sic] the following clause:
>
> 'This Agreement shall terminate automatically in the event that the Agreement of _____ 19____, between Amoco and *Checkrite Petroleum Corp.* as same may be extended or modified, is terminated for any reason.'
>
> at the time said contract is delivered to Amoco pursuant to the terms hereof."

However, a contract between Amoco and one of the eleven operators, annexed to Amoco's notice of motion to dismiss, does not appear to contain this clause. See, Amoco Oil Company Dealer Agreement with Mike Rodriguez, effective June 18, 1979 to June 1, 1980, submitted with motion papers. Since Checkrite upon termination by Amoco will lose its share of the total economic

benefit of the tri-partite relationship, it may be expected to and indeed would seem to be compelled to order the station operators to stop serving Amoco product and take their motor fuel from another source. Only by doing so could Checkrite gain a benefit of its "control" of the colors of the stations it leases to the operators.

3. This Court finds the instant case distinguishable from *Mel-Bern Service Center No. 6 Corp. v. Tartan Oil Corp., et al.*, 78 CV 107 (E.D.N.Y. April 6, 1979, Pratt, D.J.), cited by Amoco. In that case, the court held that when the defendant "broker" reduced commissions to plaintiff retailers, it did not violate Subpart "F" of the regulations of the Federal Energy Agency ("FEA") (now the Department of Energy), 10 C.F.R. §§212.92 and 212.93. the court, relying on FEA Interpretation 1974-12, followed in *New York Metropolitan Petroleum Jobbers Committee*, 1 FEA ¶ 20,175 (November 7, 1974), held that the defendant was not a reseller, reseller-retailer, or a retailer under the relevant regulations. The instant case does not involve an interpretation of the regulations at issue in *Mel-Bern*, nor an interpretation of the word "reseller."

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT DATED SEPTEMBER 9, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 2541-CLB

CHECKRITE PETROLEUM, INC.,

Plaintiff,

-against-

AMOCO OIL COMPANY,

Defendant.

Brieant, J.

Familiarity is assumed with this Court's Memorandum Decision and Order dated June 15, 1981 in this action. That Memorandum contains findings and conclusions based on submitted documents and the transcript of a hearing held May 19, 1981, and resulted in a preliminary injunction being granted in favor of plaintiff ("Checkrite") against defendant ("Amoco").

The case presented a question apparently of first impression in this Court; whether plaintiff, a so-called "broker" is protected from termination without cause as a "franchisee" under the Petroleum Market Practices Act ("PMPA"), 15 U.S.C. §§2801, *et seq.* Based on the documentation then available, this Court concluded that the plaintiff was protected by the statute for the reasons therein set forth, as a franchisee or distributor.

Memorandum and Order of the United States District Court Dated September 9, 1981

No formal injunction order was ever issued. Although a proposed preliminary injunction order and a proposed counter order were submitted on notice returnable June 22, 1981, no order was signed pending further inquiry as to whether a final judgment could issue in the matter. In the meantime Amoco agreed to and did, maintain the *status quo* insofar as concerns continued supply to the Checkrite stations.

The Court held in its June 15, 1981 Memorandum (p. 17) as follows:

> "The Court's consideration of the matter suggests that plaintiff Checkrite is entitled to summary judgment in its favor. The Court is concerned, however, that there may be additional documents or factual information which either or both parties may require to have in the Court record prior to [appeal], as this is a case of first impression involving statutory construction of a most significant sort. [Footnote omitted]. Accordingly, the Court directs that a conference take place . . . at which this Court will examine and consider whether additional proof by way of document or testimony must be taken, and will make a final determination whether summary judgment should be granted to plaintiff based on the reasoning and analysis set forth hereinabove."

Thereafter, further documents, affidavits and memoranda have been submitted, and a further hearing was held. These post-hearing submissions have been somewhat confusing, and there

has been difficulty ascertaining the scope and significance of plaintiff's documentation. However, finally, on September 8, 1981, the matter was fully submitted.

I now find that there is no genuine issue of fact which prevents final resolution of the issue in favor of the plaintiff as to those locations or retail outlets where the documentation supports the theory upon which plaintiffs prevailed in the June 15th Memorandum Decision. There are distinct factual variances as between different locations or stations, the effect of which is discussed below. The numbers refer to account numbers maintained by Amoco:

No. 13131 at Wyandanch. As to this station, which is apparently now closed temporarily, Checkrite has not produced any lease or document by which, within the rationale of the Court's June 15, 1981 decision, it controls the choice of brand for this outlet. A so-called "461 Agreement," which Amoco has with Leroy Baldwin, does provide, however, that it expires if the agreement between Checkrite and Amoco expires.

The Court concludes that the references to such a Checkrite agreement in Amoco's own dealership agreement is sufficient to supply the omission as to this outlet, and that plaintiff is entitled to summary judgment granting permanent injunctive relief as to the Wyandanch station.

No. 12972 at Farmingdale. The lease on this station, received in evidence as Pltf's Ex. 1 at the hearing on September 8, 1981, contains a clause typed as Paragraph No. 38 in the typewritten addendum to a printed form of lease, to the effect that "this contract constitutes as [sic] the whole agreement between the

parties. There are no promises, terms, obligations, covenants or conditions other than contained herein. No variations hereof shall be deemed valid unless signed by the parties with the same formalities as this contract." This lease is with Shaemark Industries, Inc., as tenant, and was executed by Checkrite as landlord. It contains no clause granting Checkrite the power to control the brand of product sold. This lease shows that Checkrite is the assignee of a paramount lease dated May 17, 1968. In view of the integration clause, and the failure to present any document which compels Shaemark or its successor or operator to comply with Checkrite's designation of the brand of product to be sold there, there is a failure of proof as to this location, within the rationale of this Court's prior decision. As to this location, Amoco is entitled to summary judgment in its favor and plaintiff is entitled to no relief.

No. 12766 at Hauppauge. Here the dealer is operating under a lease which has expired, and has been treated by the dealer and Checkrite as a month-to-month tenant. Under New York law, a tenant who holds over following the expiration of his lease and who is treated as a month-to-month tenant by the landlord is presumed in the absence of evidence to the contrary to hold on the same terms and conditions as existed in the expired written lease. *Church v. Doe*, 234 N.Y.S. 2d 522, 525 (1962). There is no showing that this is not the case with respect to the Hauppauge location. The Court finds the evidence sufficient as to the Hauppauge location to permit a finding that Checkrite retains the power to designate the brand and so long as the month-to-month tenancy continues, the Court regards the provision in the expired lease which allows Checkrite to control the brand as remaining in full force and effect. Plaintiff is entitled to summary judgment as to this location.

Memorandum and Order of the United States District Court Dated September 9, 1981

No. 12802 at Lake Ronkonkoma. This location differs only in that the landlord is not Checkrite, but "The Wisser Company, Inc.," a sister corporation also controlled by Mr. Wisser, who is the principal of Checkrite. For purposes of this action the Lake Ronkonkoma property comes within the theory of the case, and I conclude that through control of the location by its sister corporation Checkrite controls the brand of product sold there, as it represented it did in its agreement with Amoco.

As to five of the eleven stations, Checkrite produced no leases of the sort which were represented to exist at the time of the preliminary injunction hearing. It now appears that these respective dealers or their affilitates own these stations outright. Checkrite showed "primary gasoline and motor oil agreements" on a traditional one-page printed form generally used by jobbers and other suppliers of petroleum products. These identical agreements purport to be for the "sale and delivery" by Checkrite of all of the operators' requirements with respect to the station, and purport to provide for f.o.b. gasoline sales at "seller's [Checkrite's] posted dealer prices" and specify terms of payment. They do restrict the buyer to the sale of "seller's" gasoline. Use of this form of agreement is anomolous to say the least, because Checkrite has never bought or sold motor fuel, or made deliveries, and has no posted dealer prices. There is no provision in the agreements for assignment by Checkrite, or designation by Checkrite of another as seller to perform the supply side of the agreement. The documents do not fit the facts, they do not comply with the apparent intentions of the three parties at the time they were executed, and are arguably inconsistent with the agreement Checkrite has with Amoco, pursuant to which they were generated by Checkrite.

Memorandum and Order of the United States District Court Dated September 9, 1981

It now appears that Checkrite has no ownership interest, because all five of these "primary agreement" stations are owned by the Amoco dealers themselves. Defendant argues from this (Memorandum docketed August 26, 1981, p. 8) that "hence Checkrite is evidently in no position to require these stations to change brands . . . and these stations do not come within the standard established by the Court."

The Court does not agree. As is often the case in matters attended to by businessmen, the agreements are inartistically drawn. It would seem apparent from the agreement between Checkrite and Amoco that the parties, or at least Checkrite, thought that these agreements were adequate to allow Checkrite to control the brand of petroleum products dispensed at these five stations and to change the brand from time to time if so advised. To the extent that these "primary agreements" are in effect, and are being honored by the operators, I do not believe that Amoco is in a position at this late date to challenge the adequacy of Checkrite's documentation, or the validity of its power to compel performance of the Checkrite-Amoco agreement by self-owned stations, or alternatively to challenge Checkrite's ability to delegate performance of these "primary agreements" on its part to someone else such as Amoco. While these five stations continue to dispense Amoco products, and are bound to Checkrite as a "supplier," the Court believes that Checkrite is entitled to permanent injunctive relief as to them. This conclusion flows from the practical construction of these agreements for various lengthy periods by the parties themselves. The operators have been dealing directly with Amoco under a written agreement by which Checkrite was their supplier, and until it concluded to end its agreement with Checkrite, Amoco never contended that Checkrite had not performed its contract obligation to Amoco, to "control" these outlets.

Memorandum and Order of the United States District Court Dated September 9, 1981

In this connection the Court notes that No. 12817 at Northport is said to be "in the process of converting to Chevron, a competing brand." If this is true, of course the claim for an injunction is moot. If such a conversion is being made with the acquiecence of Checkrite, it is some evidence either that Checkrite is about to breach its duty to Amoco, or some evidence that its documentation is ineffectual to create the relationship with the operator which Checkrite now claims it intended to create, and which its agreement with Amoco represents and confirms that it had. But unless and until any of these five stations reject Amoco and get away with it, I conclude that Checkrite is entitled to continue to perform, and to receive injunctive relief. If such performance ceases, Amoco may treat it as a breach, and a cause for termination after notice, pursuant to §105 of the PMPA, a possibility which is noted, but upon which this Court expresses no opinion.

It is also suggested by Amoco that one or more of the stations may have been buying gasoline from another supplier and passing it off to the public as Amoco's product. If this is so, nothing directed by this Court derogates in any way from Amoco's rights to whatever relief the law allows, including cancellation of the franchise for that location, on notice, pursuant to §105 of the PMPA, with a statement of reasons. This is exactly the procedure which Amoco has refused to follow with respect to Checkrite, and that failure is the basis for this lawsuit, Nothing contained herein or in the June 15th opinion is or was intended to limit Amoco's right to proceed in accordance with the statute where grounds for termination are said to exist.

This Court adheres to its prior legal conclusions in the matter, and concludes that Checkrite is entitled to a final judgment

granting declaratory and permanent injunctive relief and enjoining termination without prior notice and compliance with §105 of the PMPA, as to those stations, other than the location No. 12972 at Farmingdale.

The Court finds no basis for a damage action here. The supply was not interrupted because of intervention by the Court, and there is no evidence of any violation of the PMPA in this case which caused monetary damage to Checkrite. The Court concludes also that there is no basis for punitive damages or an award of attorneys' fees. The matter was disposed of on motion without undue cost. This litigation presents a close case. The reasonableness of Amoco's reliance on its interpretation of the statutory language is inconsistent with any bad purpose of the sort which would evoke punitive damages.

Settle a final judgment in accordance with the foregoing. Such judgment should be presented to the Court on ten (10) days notice of settlement, and should be filed promptly.

So Ordered.

Dated: New York, New York
September 9, 1981

CHARLES L. BRIEANT
Charles L. Brieant
U. S. D. J.

ORDER AND JUDGMENT OF THE DISTRICT COURT DATED OCTOBER 6, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 2541 (CLB)

CHECKRITE PETROLEUM, INC.,

Plaintiff,

-against-

AMOCO OIL COMPANY,

Defendant.

Plaintiff having moved this Court by Order to Show Cause for an injunction under the Petroleum Marketing Practices Act ("PMPA") §105(b), and defendant having cross moved to dismiss the complaint and for summary judgment on the ground that plaintiff is not covered by the PMPA and that the complaint does not state a claim upon which relief can be granted:

NOW, upon all the papers filed in support of and in opposition to the motions, and the motions having been duly submitted and due deliberation having been had thereon, it is

ORDERED ADJUDGED AND DECREED; that the motions of defendant to dismiss the complaint and for summary judgment are denied except with respect to a service station located in Farmingdale, as to which defendant's motion is granted, and it is further

Order and Judgment of the District Court Dated October 6, 1981

ORDERED that the motion of plaintiff for a permanent injunction is granted to the extent that defendant is enjoined from terminating and is thereby obligated to continue to perform the Agreement dated March 31, 1976, and to pay commissions to plaintiff as provided therein, except as to the service station located in Farmingdale and except that defendant is not enjoined from future termination or non-renewal of plaintiff or any of the dealers operating service stations referred to in the complaint and the exhibits thereto upon proper notice and compliance with §105 of the PMPA, and it is further

ORDERED that plaintiff's claims for compensatory damages, punitive damages and attorneys' fees are denied.

Dated: New York, New York
October 6, 1981

s/ Charles L. Brieant
U.S.D.J.

Judgment entered 10/7/81

s/ Raymond F. Burghardt
Clerk

MEMORANDUM AND ORDER OF THE DISTRICT COURT DATED OCTOBER 15, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 2541-CLB

CHECKRITE PETROLEUM, INC.,

Plaintiff,

-against-

AMOCO OIL COMPANY,

Defendant.

Brieant, J.

On October 6, 1981 a judgment was entered in this action in the form proposed by the attorneys for defendant and submitted to this Court pursuant to notice of settlement returnable on that date. At the time that the judgment submitted by defendant was signed, the Court was not in possession of three (3) proposed judgments prepared and served by the attorney for plaintiff. These did not reach the Court until October 13, 1981.

The Court has examined the three proposed judgments submitted by plaintiff's attorney and received October 13, 1981. These were accompanied by a hand-written note reading as follows: "I desire Judgment #1. If I cannot have Judgment #1 then may I have #2. If not #1 or #2 then #3."

The Court believes that the judgment as signed on October 6, 1981 comports with the decision directing its submission.

Memorandum and Order of the District Court Dated October 15, 1981

Treating the plaintiff's submissions referred to above as an application to vacate or resettle the form of the judgment, the application is denied.

Plaintiff by a separate memorandum also seeks reargument and reconsideration of the prior determination of the Court with respect to legal fees and monetary damages. Reargument is granted. The Court on reargument adheres to its prior conclusion that plaintiff suffered no monetary damages cognizable in this litigation, and proved none.

With respect to legal fees, the position of plaintiff appears to be well taken, and on further reflection, the Court believes plaintiff should recover its reasonable and necessary attorneys fees. There is no present record before this Court which would justify a factual finding as to the number of hours reasonably consumed in rendering the legal services. Unless the time charges can be stipulated or agreed to, they must be the subject of an evidentiary hearing, to be held following presentation of a detailed affidavit. The memorandum received October 13, 1981 in support of the motion to reargue also points out that in addition to legal services already rendered, plaintiff will be required to incur additional legal fees for services subsequent to the entry of judgment in this Court. The Court now concludes on reargument as a matter of discretion, that plaintiff is entitled under the statute to its reasonable attorneys fees.

This Court continues to hold the view that this litigation presents a close case. Little purpose would be served in adjudicating the amount of the legal fees at this time when the total legal services have not been concluded in the matter, and while there remains no evidentiary record (or stipulation in lieu of an evidentiary

record) which would permit a factual finding as to the reasonable value of the services. The interests of justice would be served by a prompt resolution of the inevitable appeal of the substantive issues already decided.

On reargument the prior Memorandum and Order dated September 9, 1981 is modified accordingly, and the final judgment of this Court docketed October 7, 1981 is also modified to add the following provision in lieu of the last paragraph thereof, which shall now read as follows:

> "ORDERED AND ADJUDGED that plaintiff's claims for compensatory damages and punitive damages are denied; and it is further
>
> ORDERED AND ADJUDGED that plaintiff is entitled to a reasonable attorney's fee for services rendered and to be rendered in this litigation. That issue is severed and jurisdiction is reserved in this Court to adjudicate the amount thereof after a hearing upon notice. Application may be made for the fee at the foot of this judgment following appellate finality, in the event that plaintiff prevails on appeal.
>
> The Court finds no just cause for delay and directs that this judgment shall be a final judgment as to all issues herein decided, pursuant to Rule 54(b), F.R.Civ.P."

So Ordered.

Memorandum and Order of the District Court Dated October 15, 1981

Dated: New York, New York
October 15, 1981

CHARLES L. BRIEANT
Charles L. Brieant
U. S. D. J.

AMENDED JUDGMENT OF THE DISTRICT COURT DATED OCTOBER 20, 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 2541-CLB

CHECKRITE PETROLEUM, INC.,

Plaintiff,

-against-

AMOCO OIL COMPANY,

Defendant.

Plaintiff having moved this Court by Order to Show Cause for an injunction under the Petroleum Marketing Practices Act ("PMPA") §105(b), and defendant having cross moved to dismiss the complaint and for summary judgment on the ground that plaintiff is not covered by the PMPA and that the complaint does not state a claim upon which relief can be granted:

NOW, upon all the papers filed in support of and in opposition to the motions, and the motions having been duly submitted and due deliberation having been had thereon, and plaintiff having moved for reargument; it is

ADJUDGED AND DECREED, that the motions of defendant to dismiss the complaint and for summary judgment are denied except with respect to a service station located in Farmingdale, as to which defendant's motion is granted; and it is further

Amended Judgment of the District Court Dated October 20, 1981

ADJUDGED AND DECREED, that defendant is permanently enjoined from terminating and is hereby obligated to continue to perform the Agreement dated March 31, 1976, and to pay commissions to plaintiff as provided therein, except as to the service station located in Farmingdale and except that defendant is not enjoined from future termination or non-renewal of plaintiff or any of the dealers operating service stations referred to in the complaint and the exhibits thereto upon proper notice and compliance with §105 of the PMPA; and it is further

ADJUDGED AND DECREED that plaintiff's claims for compensatory damages and punitive damages are denied; and it is further

ADJUDGED AND DECREED that plaintiff is entitled to a reasonable attorney's fee for services rendered and to be rendered in this litigation. That issue is severed and jurisdiction is reserved in this Court to adjudicate the amount thereof after a hearing upon notice. Application may be made for the fee at the foot of this judgment following appellate finality, in the event that plaintiff prevails on appeal.

The Court finds no just cause for delay and directs that this Judgment shall be a final judgment as to all issues herein decided, pursuant to Rule 54(b), F.R.Civ.P.

Dated: New York, New York
October 20, 1981

CHARLES L. BRIEANT
Charles L. Brieant
U. S. D. J.

PETROLEUM MARKETING PRACTICES ACT, 15 U.S.C. §2801

PUBLIC LAW 95-297—JUNE 19, 1978

An Act

To provide for the protection of franchised distributors and retailers of motor fuel and to encourage conservation of automotive gasoline and competition in the marketing of such gasoline by requiring that information regarding the octane rating of automotive gasoline be disclosed to consumers.

Be it enacted by the Senate and House of Representatives of the United States of America Congress assembled, That this Act may be cited as the "Petroleum Marketing Practices Act".

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TITLE I—FRANCHISE PROTECTION

Definitions

Sec. 101. As used in this title:

(1)(A) The term "franchise" means any contract—

(i) between a refiner and a distributor,

(ii) between a refiner and a retailer,

(iii) between a distributor and another distributor, or

(iv) between a distributor and a retailer,

under which a refiner or distributor (as the case may be) authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which

supplies motor fuel to the distributor which authorizes or permits such use.

(B) The term "franchise" includes—

(i) any contract under which a retailer or distributor (as the case may be) is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such occupancy;

(ii) any contract pertaining to the supply of motor fuel which is to be sold, consigned or distributed—

(I) under a trademark owned or controlled by a refiner; or

(II) under a contract which has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, motor fuel was sold, consigned or distributed under a trademark owned or controlled on such date by a refiner; and

(iii) the unexpired portion of any franchise, as defined by the preceding provisions of this paragraph, which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) The term "franchise relationship" means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.

(3) The term "franchisor" means a refiner or distributor (as the case may be) who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(4) The term "franchisee" means a retailer or distributor (as the case may be) who is authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(5) The term "refiner" means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.

(6) The term "distributor" means any person, including any affiliate of such person, who—

(A) purchases motor fuel for sale, consignment, or distribution to another; or

(B) receives motor fuel on consignment for consignment or distribution to his own motor fuel accounts or to accounts of his supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.

(7) The term "retailer" means any person who purchases motor fuel for sale to the general public for ultimate consumption.

(8) The term "marketing premises" means, in the case of any franchise, premises which, under such franchise, are to be employed by the franchisee in connection with the sale, consignment, or distribution of motor fuel.

(9) The term "leased marketing premises" means marketing premises owned, leased, or in any way controlled by a franchisor and which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment, or distribution of motor fuel.

(10) The term "contract" means any oral or written agreement. For supply purposes, delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver such levels.

(11) The term "trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

(12) The term "motor fuel" means gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways.

(13) The term "failure" does not include—

(A) any failure which is only technical or unimportant to the franchise relationship; or

(B) any failure for a cause beyond the reasonable control of the franchisee.

(14) The terms "fail to renew" and "nonrenewal" mean, with respect to any franchise relationship, a failure to reinstate, continue, or extend the franchise relationship—

(A) at the conclusion of the term, or on the expiration date, stated in the relevant franchise;

(B) at any time, in the case of the relevant franchise which does not state a term of duration or an expiration date; or

(C) following a termination (on or after the date of enactment of this Act) of the relevant franchise which was entered into prior to such date of enactment and has not been renewed after such date.

(15) The term "affiliate" means any person who (other than by means of a franchise) controls, is controlled by, or is under common control with, any other person.

(16) The term "relevant geographic market area" includes a State or a standard metropolitan statistical area as periodically established by the Office of Management and Budget.

(17) The term "termination" includes cancellation.

(18) The term "commerce" means any trade, traffic, transportation, exchange, or other commerce—

(A) between any State and any place outside of such State; or

(B) which affects any trade, transportation, exchange, or other commerce described in subparagraph (A).

(19) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and any other commonwealth, territory, or possession of the United States.

Petroleum Marketing Practices Act

FRANCHISE RELATIONSHIP; TERMINATION AND NONRENEWAL

Sec. 102.(a) Except as provided in subsection (b) and section 103, no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may—

(1) terminate any franchise (entered into or renewed on or after the date of enactment of this Act) prior to the conclusion of the term, or the expiration date, stated in the franchise; or

(2) fail to renew any franchise relationship (without regard to the date on which the relevant franchise was entered into or renewed).

(b)(1) Any franchisor may terminate any franchise (entered into or renewed on or after the date of enactment of this Act) or may fail to renew any franchise relationship, if—

(A) the notification requirements of section 104 are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:

(A) A failure by the franchisee to comply with any provision of the franchise, which provision is both

reasonable and of material significance to the franchise relationship, if the franchisor first acquired actual or constructive knowledge of such failure—

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 104(a); or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 104(b)(1).

(B) A failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise, if—

(i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions; and

(ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination or nonrenewal was given pursuant to section 104.

(C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence—

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 104(a); or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 104(b)(1).

(D) An agreement, in writing, between the franchisor and the franchisee to terminate the franchise or not to renew the franchise relationship, if—

(i) such agreement is entered into not more than 180 days prior to the date of such termination or, in the case of non-renewal, not more than 180 days prior to the conclusion of the term, or the expiration date, stated in the franchise:

(ii) the franchisee is promptly provided with a copy of such agreement, together with the summary statement described in section 104(d); and

(iii) within 7 days after the date on which the franchisee is provided a copy of such agreement, the franchisee has not posted by certified mail a written notice to the franchisor repudiating such agreement.

(E) In the case of any franchise entered into prior to the date of the enactment of this Act and in the case of any franchise entered into or renewed on or after such date (the term of which is 3 years or longer, or with respect

to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if—

(i) such determination—

(I) was made after the date such franchise was entered into or renewed, and

(II) was based upon the occurrence of changes in relevant facts and circumstances after such date;

(ii) the termination or nonrenewal is not for the purpose of converting the premises, which are the subject of the franchise, to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises—

(I) the franchisor, during the 180-day period after notification was given pursuant to section 104, either made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises, or, if applicable, offered the franchisee a right of first refusal of at least 45 days duration of an offer, made by another, to purchase such franchisor's interest in such premises; or

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

(3) For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:

(A) The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if—

(i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and

(ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of preventing the renewal of the franchise relationship.

(B) The receipt of numerous bona fide customer

complaints by the franchisor concerning the franchisee's operation of the marketing premises, if—

(i) the franchisee was promptly apprised of the existence and nature of such complaints following receipt of such complaints by the franchisor; and

(ii) if such complaints related to the condition of such premises or to the conduct of any employee of such franchisee, the franchisee did not promptly take action to cure or correct the basis of such complaints.

(C) A failure by the franchisee to operate the marketing premises in a clean, safe, and healthful manner, if the franchisee failed to do so on two or more previous occasions and the franchisor notified the franchisee of such failures.

(D) In the case of any franchise entered into prior to the date of the enactment of this Act (the unexpired term of which, on such date of enactment, is 3 years or longer) and, in the case of any franchise entered into or renewed on or after such date (the term of which was 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business, if—

(i) such determination is—

(I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(II) to materially alter, add to, or replace such premises,

(III) to sell such premises, or

(IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee;

(ii) with respect to a determination referred to in subclause (II) or (IV), such determination is not made for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises such franchisor, during the 90-day period after notification was given pursuant to section 104, either—

(I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or

(II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises.

(c) As used in subsection (b)(2)(C), the term "an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable" includes events such as—

(1) fraud or criminal misconduct by the franchisee relevant to the operation of the marketing premises;

(2) declaration of bankruptcy or judicial determination of insolvency of the franchisee;

(3) continuing severe physical or mental disability of the franchisee of at least 3 months duration which renders the franchisee unable to provide for the continued proper operation of the marketing premises;

(4) loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease, if the franchisee was notified in writing, prior to the commencement of the term of the then existing franchise—

(A) of the duration of the underlying lease, and

(B) of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of termination) or at the end of such term (in the case of nonrenewal);

(5) condemnation or other taking, in whole or in part, of the marketing premises pursuant to the power of eminent domain;

(6) loss of the franchisor's right to grant the right to use the trademark which is the subject of the franchise, unless such loss was due to trademark abuse, violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence is related to action taken in bad faith by the franchisor;

(7) destruction (other than by the franchisor) of all or a substantial part of the marketing premises;

(8) failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled;

(9) failure by the franchisee to operate the marketing premises for—

(A) 7 consecutive days, or

(B) such lesser period which under the facts and circumstances constitutes an unreasonable period of time;

(10) willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations by the franchisee;

(11) knowing failure of the franchisee to comply with Federal, State, or local laws or regulations relevant to the operation of the marketing premises; and

(12) conviction of the franchisee of any felony involving moral turpitude.

(d) In the case of any termination of a franchise (entered into or renewed on or after the date of enactment of this Act), or in the case of any nonrenewal of a franchise relationship (without regard to the date on which such franchise relationship was entered into or renewed)—

(1) if such termination or nonrenewal is based upon an event described in subsection (c)(5), the franchisor shall fairly apportion between the franchisor and the franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or good will; and

(2) if such termination or nonrenewal is based upon an event described in subsection (c)(7) and the leased marketing premises are subsequently rebuilt or replaced by the franchisor and operated under a franchise, the franchisor shall, within a reasonable period of time, grant to the franchisee a right of first refusal of the franchise under which such premises are to be operated.

TRIAL FRANCHISES AND INTERIM FRANCHISES; NONRENEWAL

Sec. 103.(a) The provisions of section 102 shall not apply to the nonrenewal of any franchise relationship—

(1) under a trial franchise; or

(2) under an interim franchise.

(b) For purposes of this section—

(1) The term "trial franchise" means any franchise—

(A) which is entered into on or after the date of enactment of this Act;

(B) the franchisee of which has not previously been a party to a franchise with the franchisor;

(C) the initial term of which is for a period of not more than 1 year; and

(D) which is in writing and states clearly and conspicuously—

(i) that the franchise is a trial franchise;

(ii) the duration of the initial term of the franchise;

(iii) that the franchisor may fail to renew the franchise relationship at the conclusion of the initial term stated in the franchise by notifying the franchisee, in accordance with the provisions of section 104, of the franchisor's intention not to renew the franchise relationship; and

(iv) that the provisions of section 102, limiting the right of a franchisor to fail to renew a franchise relationship, are not applicable to such trial franchise.

(2) The term "trial franchise" does not include any unexpired period of any term of any franchise (other than a trial franchise, as defined by paragraph (1)) which was transferred or assigned by a franchisee to the extent

authorized by the provisions of the franchise or any applicable provision of State law which permits such transfer or assignment, without regard to any provision of the franchise.

(3) The term "interim franchise" means any franchise—

(A) which is entered into on or after the date of the enactment of this Act;

(B) the term of which, when combined with the terms of all prior interim franchises between the franchisor and the franchisee, does not exceed 3 years;

(C) the effective date of which occurs immediately after the expiration of a prior franchise, applicable to the marketing premises, which was not renewed if such nonrenewal—

(i) was based upon a determination described in section 102(b)(2)(E), and

(ii) the requirements of section 102(b)(2)(E) were satisfied; and

(D) which is in writing and states clearly and conspicuously—

(i) that the franchise is an interim franchise;

(ii) the duration of the franchise; and

(iii) that the franchisor may fail to renew the franchise at the conclusion of the term stated in the franchise based upon a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located if the requirements of section 102(b)(2)(E)(ii) and (iii) are satisfied.

(c) If the notification requirements of section 104 are met, any franchisor may fail to renew any franchise relationship—

(1) under any trial franchise, at the conclusion of the initial term of such trial franchise; and

(2) under any interim franchise, at the conclusion of the term of such interim franchise, if—

(A) such nonrenewal is based upon a determination described in section 102(b)(2)(E); and

(B) the requirements of section 102(b)(2)(E) (ii) and (iii) are satisfied.

NOTIFICATION OF TERMINATION OR NONRENEWAL

Sec. 104. (a) Prior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to

the franchisee who is a party to such franchise or such franchise relationship—

(1) in the manner described in subsection (c); and

(2) except as provided in subsection (b), not less than 90 days prior to the date on which such termination or nonrenewal takes effect.

(b)(1) In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination or nonrenewal takes effect, as required by subsection (a)(2)—

(A) such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable; and

(B) in the case of leased marketing premises, such franchisor—

(i) may not establish a new franchise relationship with respect to such premises before the expiration of the 30-day period which begins—

(I) on the date notification was posted or personally delivered, or

(II) if later, on the date on which such termination or nonrenewal takes effect; and

(ii) may, if permitted to do so by the franchise agreement, repossess such premises and, in circumstances under which it would be reasonable to do so, operate such premises through employees or agents.

(2) In the case of any termination of any franchise or any nonrenewal of any franchise relationship pursuant to the provisions of section 102(b)(2)(E) or section 103(c)(2), the franchisor shall—

(A) furnish notification to the franchisee not less than 180 days prior to the date on which such termination or nonrenewal takes effect; and

(B) promptly provide a copy of such notification, together with a plan describing the schedule and conditions under which the franchisor will withdraw from the marketing of motor fuel through retail outlets in the relevant geographic area, to the Governor of each State which contains a portion of such area.

(c) Notification under this section—

(1) shall be in writing;

(2) shall be posted by certified mail or personally delivered to the franchisee; and

(3) shall contain—

(A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;

(B) the date on which such termination or nonrenewal takes effect; and

(C) the summary statement prepared under subsection (d).

(d)(1) Not later than 30 days after the date of enactment of this Act, the Secretary of Energy shall prepare and publish in the Federal Register a simple and concise summary of the provisions of this title, including a statement of the respective responsibilities of, and the remedies and relief available to, any franchisor and franchisee under this title.

(2) In the case of summaries required to be furnished under the provisions of section 102(b)(2)(D) or subsection (c)(3)(C) of this section before the date of publication of such summary in the Federal Register, such summary may be furnished not later than 5 days after it is so published rather than at the time required under such provisions.

ENFORCEMENT

Sec. 105. (a) If a franchisor fails to comply with the requirements of section 102 or 103, the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of—

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to comply with the requirements of section 102 or 103.

(b)(1) In any action under subsection (a), the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the requirements of section 102 or 103, including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief.

(2) Except as provided in paragraph (3), in any action under subsection (a), the court shall grant a preliminary injunction if—

(A) the franchisee shows—

(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and

(ii) there exist sufficiently serious questions going to the merits to make such questions a fair ground for litigation; and

(B) the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

(3) Nothing in this subsection prevents any court from requiring the franchisee in any action under subsection (a) to post a bond, in an amount established by the court, prior to the issuance or continuation of any equitable relief.

(4) In any action under subsection (a), the court need not exercise its equity powers to compel continuation or renewal of the franchise relationship if such action was commenced—

(A) more than 90 days after the date on which notification pursuant to section 104(a) was posted or personally delivered to the franchisee;

(B) more than 180 days after the date on which notification pursuant to section 104(b)(2) was posted or personally delivered to the franchisee; or

(C) more than 30 days after the date on which the termination of such franchise or the nonrenewal of such franchise relationship takes effect if less than 90 days notification was provided pursuant to section 104(b)(1).

(c) In any action under subsection (a), the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 102(b) or 103, and, if applicable, that such franchisor complied with the requirements of section 102(d).

(d)(1) If the franchisee prevails in any action under subsection (a), such franchisee shall be entitled—

(A) consistent with the Federal Rules of Civil Procedure, to actual damages;

(B) in the case of any such action which is based upon conduct of the franchisor which was in willful disregard

of the requirements of section 102 or 103, or the rights of the franchisee thereunder, to exemplary damages, where appropriate; and

(C) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor.

(2) The question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by a jury.

(3) In any action under subsection (a), the court may, in its discretion, direct that reasonable attorney and expert witness fees be paid by the franchisee if the court finds that such action is frivolous.

(e)(1) In any action under subsection (a) with respect to a failure of a franchisor to renew a franchise relationship in compliance with the requirements of section 102, the court may not compel a continuation or renewal of the franchise relationship if the franchisor demonstrates to the satisfaction of the court that—

(A) the basis for such nonrenewal is a determination made by the franchisor in good faith and in the normal course of business—

(i) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(ii) to materially alter, add to, or replace such premises,

(iii) to sell such premises,

(iv) to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, or

(v) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee; and

(B) the requirements of section 104 have been complied with.

(2) The provisions of paragraph (1) shall not affect any right of any franchisee to recover actual damages and reasonable attorney and expert witness fees under subsection (d) if such nonrenewal is prohibited by section 102.

RELATIONSHIP OF THIS TITLE TO STATE LAW

Sec. 106. (a) To the extent that any provision of this title applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any

violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this title.

(b) Nothing in this title authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.